85-1333

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NIMROD MARKETING (OVERSEAS) LTD.
AND TOM ANDERSON-SLIGHT,
Cross-Petitioners,

v.

TEXAS ENERGY INVESTMENT CORP. AND
ADVANCED TECHNOLOGY, LTD.,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether, in a promissory estoppel action where the defendant's obligation to pay reliance damages arose under American law, the breach day rule or the judgment day rule is applicable to convert foreign currency into American dollars.

B. Whether, when a cause is remanded requiring use of the judgment day rule, the rate of exchange should be that in effect at the time of the original judgment or at the time of the corrected judgment.

C. Whether, in the situation set out above, interest should be allowed from the date of the original judgment.

II. LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

Additionally, the following listed persons have an interest in the outcome of this case and are listed in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. Texas Energy Petroleum Corporation
2. James Allison
3. Texas Energy International S.A.
4. Texas Reserve Construction Company

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Cross-Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, the writ to issue, however, only in the event this Court grants the petition for writ of certiorari in No. 85-1164, this Term.

V. OPINION BELOW

Reference is made to the Appendix in Petitioners' Brief in No. 85-1164 for the Fifth Circuit's opinion and denial of all parties' Petitions for Rehearing.

VI. JURISDICTION OF THIS COURT

This is a cross-petition filed pursuant to Rule 19.5. The petitioners' petition for certiorari was filed in this court by mailing on January 8, 1986 and was received by cross-petitioner's counsel on January 9, 1986. This cross-petition is being filed not more than 30 days thereafter.

VII. STATEMENT OF THE CASE

This is a diversity action based upon the doctrine of promissory estoppel. Texas Energy formed a joint venture with Nigerian investors to build low-cost housing in Nigeria. Nimrod was to be Texas Energy's purchasing agent. Acting pursuant to *comfort* letters, purchase orders and verbal authorizations, Nimrod began acquiring equipment and materials from Nimrod suppliers. Several months later, between October 31, 1981 and November 4, 1981, Texas Energy informed Nimrod's president, Tom Anderson-Slight, that it was withdrawing from the project.

Nimrod recovered damages for cancellation charges and out-of-pocket expenses incurred. Amounts due and owing by Nimrod to three of its British suppliers were converted by the district court from British pounds sterling to American dollars based upon the exchange rate in effect on the day of the breach of the agreement ($1.90/1 pound sterling). The exchange rate on the date of the final judgment, January 26, 1984 was $1.4045/1 pound sterling. The rate has continued to fall.

The Court of Appeals held that the correct exchange rate should be that in effect on the date a corrected judgment is entered.

VIII. REASONS FOR GRANTING THE WRIT

A. THE RATE OF EXCHANGE TO BE APPLIED TO PLAINTIFFS' DAMAGES REPRESENTING AMOUNTS DUE TO ENGLISH SUPPLIERS SHOULD BE THE DATE OF THE BREACH, AS DETERMINED BY THE DISTRICT COURT, NOT THE DATE OF JUDGMENT.

The breach day rule should apply to determine the conversion rate. In *Hicks v. Guiness*, 269 U.S. 71, 46 S. Ct. 46, 70 L.Ed. 168 (1925) a German firm owed a debt to an American company to be paid in America with the obligation stated in German marks. The Court held that the American company had a claim for dollars as of the date the contract was breached and thus the conversion rate prevailing on that date should apply.

In *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S. Ct. 166, 71 L.Ed. 383 (1926) a German bank refused to return marks on deposit when the American depositer demanded them. The court held that at the date of demand the German bank owed no duty to the plaintiff under our law; its liability was fixed at that time in marks. The amount owed should therefore be converted at the rate in effect on the date of judgment.

In *In Re Good Hope Chemical Corp.*, 747 F.2d 806 (1st Cir. 1984), *cert. denied*, ____U.S.____, 105 S. Ct. 2328, 85 L.Ed.2d 845 (1985), Good Hope, a Texas corporation and the Chapter XI debtor, had contracted with K & L, a West German manufacturer, to purchase certain specially fabricated equipment to be paid for by a fixed number of marks. The lower court had reluctantly held that the judgment day rule applied because the debt was to be paid in Germany in German marks. The First

Circuit reversed, holding that the breach day rule applied because the cause of action arose under American law. The First Circuit noted that courts and commentators have drawn from *Hicks* and *Deutsche Bank* disparate formulas for determining when to apply the judgment or breach day rules and that two principal approaches have emerged.

> The first is a rather mechanical approach that focuses on the place of payment. It requires that the judgment day rule apply when the contractual obligation is payable in a foreign country in that country's currency and that the breach day rule apply when the payment is to be made in the United States. 747 F.2d at 810.
>
> Now that the issue is squarely before us, we agree with the district court that a second approach, while more complex, conforms better with the Court's language in *Hicks* and *Deutsche Bank* and the weight of authority. This approach looks to the jurisdiction in which the plaintiff's cause of action arose to determine which rule is applicable. The judgment day rule applies only when the obligation arises entirely under foreign law. If, however, at the time of breach the plaintiff has a cause of action arising in this country under American law, the breach day rule applies. 747 F.2d at 811.

In our case, Texas Energy's obligation to pay Nimrod its reliance damages arose under American law. That fact alone is sufficient to invoke the breach-day rule. Furthermore, Texas Energy's obligation was fixed on the day of breach, November 2, 1981. On that day, Nimrod was entitled to a dollar amount in damages, determined by the exchange rate on that date. Although Nimrod's reliance damages were based, in part, on its own obligations to pay its suppliers in British pounds as deter-

mined by British law, the cause of action presently before this Court concerns Texas Energy's obligation under American law to pay Nimrod in American dollars for Nimrod's reliance damages. Should Nimrod bear the loss and Texas Energy reap the benefit of significant downward flunctuation of the British pound when Texas Energy has refused to pay the damages it owed four years ago? (An even greater disparity will in all likelihood arise if payment is delayed by further appeal.) The answer in equity is "no." Both fairness and controlling case law decree that the exchange rate should be that prevailing on the day of breach.

B. IF THE "JUDGMENT DATE" RULE IS USED, THE EXCHANGE RATE ON THE ORIGINAL JUDGMENT SHOULD BE USED, TOGETHER WITH POST-JUDGMENT INTEREST FROM JANUARY 26, 1984.

There is a precedent for the use of the date of the original judgment as the determining date for the rate of exchange on remand. *Paris v. Central Chiclera, S. de R.L.*, 193 F.2d 960 (5th Cir. 1952) was a breach of contract case where the contract had been entered into in Mexico, and was to be performed there with payment stated only in Mexican currency. The district court had computed the judgment on the basis of the rate of exchange on the date suit was filed. The appellate court determined that the date of judgment was the determining date and gave the following order:

> The judgment is modified and affirmed, and the cause remanded to the district Court with direction to it to make the necessary correction in the judgment appealed from *without changing the date of said judgment* . . . (Emphasis added)

Cross-Petitioners requested that interest at 10.81% be allowed on the judgment from January 26, 1984, the date of the original judgment.

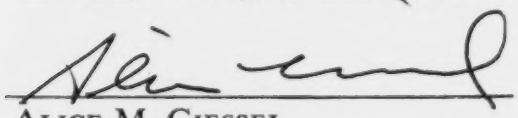
In *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983), the court found authority under 28 U.S.C. § 1961 (1976) for allowance of interest on remand from the date on which the original verdict was entered for the plaintiff. The court noted with approval and followed the "equitable" construction that the Fifth Circuit has given § 1961 in cases such as *Louisiana Arkansas Railway v. Pratt*, 142 F.2d 847, 849 (5th Cir. 1944) and *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1048 (5th Cir. 1970). *Turner* at 755.

IX. CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the petition for writ of certiorari in No. 85-1164, then it should also grant this conditional cross-petition for a writ of certiorari.

Respectfully submitted,

GIESSEL, STONE, BARKER & LYMAN



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